

The Honourable Fatou Bensouda, Chief Prosecutor
International Criminal Court
Office of the Prosecutor
Communications
Post Office Box 19519
2500 CM, The Hague
The Netherlands

December 17, 2015

Re: *Letter in Support of Filing OTP-CR-397/15*

Dear Prosecutor Bensouda,

The Global Justice Center writes to you in support of the Article 15 submission by Yazda and the Free Yazidi Foundation requesting the opening of a preliminary investigation into genocide and other crimes committed against the Yazidis.¹ Created in 2005, the Global Justice Center is an international legal human rights organization focused on using international law for strategic change and to achieve sustainable justice, peace and security. Amongst other activities, the GJC works globally to develop and implement legal strategies to define, establish and protect human rights and gender equality.

It is imperative that all possible measures are taken to investigate, address and deter the heinous crimes being committed by the so-called Islamic State of Iraq and al-Sham/Greater Syria (“ISIS” aka “ISIL”, “Daesh” or “IS”, hereinafter “ISIS”). There currently exists credible information and evidence to believe that ISIS is committing a wide range of crimes against civilians and minority populations in the areas in which it operates. This includes: genocide against Yazidis;² genocide against the Shia Shabak and Shia Turkmen;³ and crimes against humanity, ethnic cleansing and war crimes against minority populations, including Yazidi, Shabak, Turkmen, Christian, Sabeab-Mandaean and Kaka’i, and civilians under its control.⁴ Women and girls have been intentionally and strategically targeted by ISIS on ideological grounds and systematically raped, enslaved, killed and tortured.

In April of this year, you stated that “I remain profoundly concerned by this situation and I want to emphasise our collective duty as a global community to respond to the plight of victims whose rights and dignity have been violated.”⁵

Accordingly, we implore your Office (the Office of the Prosecutor (“OTP”)) to act on this duty by opening a preliminary examination into crimes committed by ISIS that fall under the jurisdiction of the International Criminal Court (“ICC”) and to ensure that any such examination takes into account and integrates the specific gender dynamics of ISIS’s strategies and policies.

The Imperative for the ICC to Open a Preliminary Examination

While there has been global condemnation of ISIS’s crimes, little to no action has been taken to investigate, document and ensure accountability. Such impunity is a driver of conflict in Iraq and has created an enabling environment for the commission of mass atrocity crimes—including against women and girls.⁶ A recent report finding that genocide is being perpetrated against the Yazidis noted that “[t]he general lack of and mismanagement of investigations and prosecutions, and lack

of accountability for perpetrators, send a strong signal to those considering taking up arms, whether in support of or against IS, that there are few costs for committing atrocities against minority communities.”⁷ Not only does this culture of impunity encourage the commission of such crimes, but evidence indicates that atrocity crimes, including rape and sexual violence, are being used as recruiting tools by ISIS.⁸ Consequently, the commission of atrocity crimes with impunity by individuals at all levels of ISIS enables, sustains and strengthens the organization.⁹

As such, the international community, including the ICC, needs to take all possible measures within its powers to take steps towards ending impunity and ensuring accountability. This is particularly important in light of the fact that there is both limited capacity and will to ensure accountability at the domestic level in the areas where ISIS operates.

We note your Office’s April 2015 statement on ISIS finding that the OTP had insufficient jurisdictional bases to open a preliminary examination at that time and welcoming further information on the positions occupied by State Party nationals in ISIS. In September 2015 and in response to this statement, Yazda and the Free Yezidi Foundation (FYF) provided you with detailed information on foreign fighters and their roles within ISIS, sufficient to meet the OTP’s requirements to open a preliminary investigation. (As that submission noted, in order for your office to proceed, the appropriate standard for consideration of an Article 15 submission is that “the alleged crimes are not outside the jurisdiction of the Court.”¹⁰)

We also note that while your Office’s general prosecutorial strategy is focused on prosecuting those “most responsible”, the OTP’s strategic plan and November 2015 Report on Preliminary Examination Activities states that:

[T]he OTP will expand its general prosecutorial strategy to encompass mid- or high-level perpetrators, or even particularly notorious low-level perpetrators, with a view to building cases up to reach those most responsible for the most serious crimes. The Office may also consider prosecuting lower-level perpetrators where their conduct has been particularly grave and has acquired extensive notoriety.¹¹

We urge the OTP to utilize such an expanded strategy in this circumstance and consider the prosecution of foreign fighters at all levels, in light of: your Office’s previous conclusion that “the prospects of my Office investigating and prosecuting those most responsible, within the leadership of ISIS, appear limited”¹²; Yazda and FYF’s Article 15 submission; and the notoriety of ISIS’s crimes. On the established premises that the commission of atrocity crimes with impunity by individuals at all levels of ISIS is key to enabling, sustaining and building the organization, we submit that there is an imperative for the OTP to, at a minimum, open a preliminary examination of foreign fighters in ISIS who are nationals of ICC State Parties.

Moreover, based on the available information, there is no reason to believe that the opening of a preliminary examination by the OTP at this time would in any way contravene the interests of justice. In fact, to the contrary, the opening of a preliminary examination would in fact serve and further the interests of justice and send a signal that atrocity crimes under the jurisdiction of the ICC cannot be committed with impunity.

Gender-Based Crimes

The Rome Statute imposes a duty on the OTP to “take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children,”¹³ which has been reinforced by the OTP’s excellent policy on sexual and gender-based crimes. Specifically,

the policy calls for the integration of a gender perspective into every stage of the prosecutorial process and calls on the Prosecutor to “charge acts of sexual and gender-based crimes as different categories of crimes within the Court’s jurisdiction (war crimes, crimes against humanity, and genocide), in order to properly describe, *inter alia*, the nature, manner of commission, intent, impact, and context.”¹⁴

We would like to commend your office for its leadership in and commitment to prioritizing gender-based crimes and incorporating a gender perspective into the work of the Court. We welcomed with appreciation your recent statement on the International Day for the Elimination of Violence against Women that you “will spare no effort to bring accountability for such heinous crimes. Where others may want to draw a veil over these crimes I, as Prosecutor, must draw a line under them.”¹⁵ We implore you to put this policy into practice in the present situation.

ISIS strategically and indiscriminately commits crimes within the jurisdiction of this court against civilians: genocide, war crimes and crimes against humanity. An examination of their ideology, strategies and policies indicate that there are strong gender dynamics that guide how these crimes are perpetrated. For example, ISIS’s genocidal strategy against the Yazidis is carried out in different ways against men and women, boys and girls: men and elderly women are killed, boys are recruited, young women and girls are enslaved and subjected to systemic sexual violence (*see* Annex for a more detailed analysis of the gendered way in which genocide is being perpetrated).

Furthermore, ISIS’s goal of an Islamic Caliphate is defined by the elimination of ethnic and religious minorities and the imposition of an ideology based on gender inequality and dominance over the lives of women and children.¹⁶ Additionally, ISIS’s state-building strategy is dependent on the subjugation of women and control over their reproductive capacity as a way to secure the continuity and future of the Caliphate.¹⁷ One clear example of these strategies is ISIS’s treatment of Yazidi women and girls who are systematically captured, murdered, enslaved, forced into marriages, raped, sexually assaulted, tortured, forcibly impregnated, and forcibly converted.¹⁸

Thus, it is essential that any examination into ISIS’s crimes by this court be grounded in a robust gender perspective and analysis.¹⁹ Our enclosed annex examines publically available information about crimes perpetrated against Yazidi women and girls and sets forth the crimes under the Rome Statute that are implicated by this information. We urge you to utilize this to help guide any investigation by your Office.

Madame Prosecutor, you recently stated that “as Prosecutor of the ICC, I stand ready to play my part, in an independent and impartial manner, in accordance with the legal framework of the Rome statute.” On behalf of the Global Justice Center, I ask you to begin playing this part by opening a preliminary examination and ensuring justice for women and girls subjected to inhumane treatment at the hands of ISIS.

Respectfully submitted,



Janet Benshoof
President, Global Justice Center

Enclosures:

1. Annex: ISIS's Gender-Based Crimes against Yazidi Women and Girls

¹ In the preparation of this letter and enclosed annex on gender-based crimes against Yazidi women and girls, GJC has relied upon a selected number of publicly available reports documenting crimes committed by ISIS.

² Human Rights Council, *Report of the Office of the United Nations Commissioner for Human Rights on the Human Rights Situation in Iraq in the Light of the Abuses Committed by the So-called Islamic State in Iraq and the Levant and Associated Groups*, ¶ 17, U.N. Doc. A/HRC/28/18 (Mar. 13, 2015) [hereinafter OHCHR]; U.S. Holocaust Mem'l Museum, "Our Generation is Gone," *The Islamic State's Targeting of Iraqi Minorities in Ninewa* 20-21 (2015), <http://www.ushmm.org/m/pdfs/Iraq-Bearing-Witness-Report-111215.pdf>; U.S. Comm'n on Int'l Religious Freedom, *USCIRF Statement on the Designation of Victims of Genocide Persecution, and Crimes Against Humanity in Syria and Iraq* (Dec. 7, 2015), <http://www.uscirf.gov/news-room/press-releases/uscirf-statement-the-designation-victims-genocide-persecution-and-crimes>.

³ U.S. Holocaust Mem'l Museum, *supra* note 2, at 3; U.S. Comm'n on Int'l Religious Freedom, *supra* note 2.

⁴ U.S. Holocaust Mem'l Museum, *supra* note 2, at 18; OHCHR, *supra* note 2, at ¶¶ 16-49.

⁵ Int'l Criminal Court, Office of the Prosecutor, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, marking the International Day for the Elimination of Violence Against Women* (Nov. 25, 2015), https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-25-11-2015-IDEVAW'.aspx.

⁶ U.S. Holocaust Mem'l Museum, *supra* note 2, at 28.

⁷ *Id.*

⁸ Rukmini Callimachi, *ISIS Enshrines a Theology of Rape*, N.Y. TIMES (Aug. 13, 2015), http://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html?_r=0; U.S. Holocaust Mem'l Museum, *supra* note 2, at 10.

⁹ U.S. Holocaust Mem'l Museum, *supra* note 2, at 10.

¹⁰ Yazda & Free Yazidi Foundation, *ISIL: Nationals of ICC States Parties Committing Genocide and Other Crimes against the Yazidis*, Section IV (Sept. 2015).

¹¹ Int'l Criminal Court, Office of the Prosecutor, *Strategic Plan: June 2012-2015*, ¶ 22 (Oct. 11, 2013), https://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf; Int'l Criminal Court, Office of the Prosecutor, *Report on Preliminary Examination Activities 3* (Nov. 12, 2015), <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf>.

¹² Int'l Criminal Court, Office of the Prosecutor, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Alleged Crimes Committed by ISIS* (Apr. 8, 2015), https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-08-04-2015-1.aspx.

¹³ Rome Statute of the International Criminal Court, art. 54(1)(b), July 17, 1998, 2187 U.N.T.S. 3.

¹⁴ Int'l Criminal Court, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, ¶¶ 1, 8, 25 & 72-73 (June 2014), <http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>.

¹⁵ Int'l Criminal Court, Office of the Prosecutor, *supra* note 5.

¹⁶ See Independent International Commission of Inquiry on the Syrian Arab Republic, *Rule of Terror: Living under ISIS in Syria*, ¶¶ 47-49 (Nov. 14, 2014); Quilliam Found., *Women of the Islamic State: A Manifesto on Women by the Al-Khanssaa Brigade* (Feb. 2015) (translation and analysis by Charlie Winter). See also Mah-Rukh Ali, *ISIS and Propoganda: How ISIS Exploits Women*, REUTERS INST. FOR THE STUDY OF JOURNALISM (2015).

¹⁷ Erin Marie Saltman & Melanie Smith, "Till Martyrdom Do Us Part": *Gender and ISIS Phenomenon*, INST. FOR STRATEGIC DIALOGUE 18 (2015), http://www.strategicdialogue.org/Till_Martyrdom_Do_Us_Part_Gender_and_the_ISIS_Phenomenon.pdf.

¹⁸ See Annex: ISIS's Gender-Based Crimes against Yazidi Women and Girls

¹⁹ Int'l Criminal Court, Office of the Prosecutor, *supra* note 14, at 3 ("'Gender perspective' requires an understanding of differences in status, power, roles, and needs between males and females, and the impact of gender on people's opportunities and interactions. This will enable the Office to gain a better understanding of the crimes, as well as the experiences of individuals and communities in a particular society"; "'Gender analysis' examines the underlying differences and inequalities between women and men, and girls and boys, and the power relationships and other dynamics which determine and shape gender roles in a society, and give rise to assumptions and stereotypes. In the context of the work of the Office, this involves a consideration of whether, and in what ways, crimes, including sexual and gender-based crimes, are related to gender norms and inequalities.").